

Public Utilities Under Home Rule

The power of the municipality in Ohio to construct, acquire or contract with a public utility, was, prior to the adoption of the Home Rule Amendment,¹ limited to that expressly granted by the General Assembly through various statutory provisions.² Subsequent to the adoption of Article XVIII, however, that power no longer derived from, nor was it subject to substantial limitation by the legislature.³ The power granted to the municipality by Sections 4 through 12 of the amendment stems from the people of Ohio, through the constitution.⁴ It is self-limiting,⁵ and, as such, is not subject to implied limitations,⁶ nor those imposed by the legislature.⁷ Further, the power is plenary and self-executing,⁸ requiring no implementation by the legislature,⁹ and it is not necessary that the municipality in order to exercise the power shall have adopted a charter under Section 7 of the amendment.¹⁰ This is not to say that the legislature may not constitutionally limit the disposition of surplus revenue, nor that the assembly may not indirectly impose a limitation under section 13 of the amendment by prescribing a debt limit.

A statute in derogation of the provisions of the sections referred to above is of no effect, even though enacted prior to the adoption of the amendment.¹¹ Thus, the statutory power to contract with a privately owned utility prior to November 15, 1912,¹² was supplanted on that date by the exclusive power so to contract provided by Section 4, Article XVIII, and, therefore, duties required of municipalities in regard to the exercise of powers ac-

¹OHIO CONST. Art. XVIII.

²OHIO CONST. Art. XIII, § 6. OHIO GEN. CODE §§ 3955, 3990, 4000-1 *et seq.* Village of Euclid v. Camp Wise Association, 102 Ohio St. 207, 131 N.E. 349 (1921).

³Link v. Public Utilities Commission of Ohio, 102 Ohio St. 336, 131 N.E. 796 (1921); State *ex rel.* City of Toledo v. Weiler, 101 Ohio St. 123, 128 N.E. 88 (1920).

⁴Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923).

⁵Priest v. City of Wapakoneta, 8 Ohio Op. 439, 32 N.E. 2d 869 (1937).

⁶*Ibid.*

⁷Link v. Public Utilities Commission of Ohio, 102 Ohio St. 336, 131 N.E. 796 (1921).

⁸Priest v. City of Wapakoneta, 8 Ohio Op. 439, 32 N.E. 2d 869 (1937); State *ex rel.* City of Toledo v. Weiler, 101 Ohio St. 123, 128 N.E. 88 (1920).

⁹State *ex rel.* Doerfler v. Otis, 98 Ohio St. 83, 120 N.E. 313 (1918).

¹⁰Village of Euclid v. Camp Wise Association, 102 Ohio St. 207, 131 N.E. 349 (1921); Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923); State *ex rel.* City of Toledo v. Weiler, 101 Ohio St. 123, 128 N.E. 88 (1920).

¹¹Dravo-Doyle v. Village of Orrville, 93 Ohio St. 236, 112 N.E. 508 (1915).

¹²Effective date of Home Rule Amendment.

quired under pre-existent statutes were no longer enforceable, since the power of the legislature to impose such duties no longer existed.¹³

Traditionally, the term "public utility" has been used to describe a type of business enterprise which exists for the accommodation of the public, the members of which as such are entitled as of right to use its facilities.¹⁴ Usually such an enterprise is thought of as monopolistic or quasi-monopolistic in form, and that fact presumably accounts for the existence of regulatory controls over utilities.

Every state allows municipal ownership and operation of public utilities,¹⁵ but the term "public utility" is variously defined among the different states. Oklahoma courts have defined the term very broadly to include such things as a cemetery,¹⁶ a convention hall,¹⁷ a cotton gin,¹⁸ sewers,¹⁹ public fire stations,²⁰ and public parks.²¹ Iowa and Oregon courts include a golf course within the scope of their definitions.²² Texas courts include bathing pools.²³ Texas municipalities may manufacture "anything . . . that may be needed by the public."²⁴ A Michigan court used the public use test in at least one decision, wherein the court said: "Utility means state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility."²⁵

Although the question has not been frequently litigated in Ohio, her courts have generally attributed a narrower connotation

¹³OHIO GEN. CODE § 3963, which prohibits a municipality from charging schools, hospitals and charitable institutions for water, was held invalid, as in contravention of Art. XVIII, § 4, in *Board of Education v. Columbus*, 118 Ohio St. 295, 160 N.E. 902 (1928). As to hospitals, see *Kasch v. Peoples Hosp. Co.*, 54 Ohio App. 80, 5 N.E. 2d 1020 (1936), (*appeals dismissed* 131 Ohio St. 286, 2 N.E. 2d 778 (1936)). As to charitable institutions, see *Village of Euclid v. Camp Wise Association*, 102 Ohio St. 207, 131 N.E. 349 (1921).

¹⁴RESTATEMENT, TORTS § 191a; *Junction Water Co. v. Riddle*, 108 N.J.Eq. 523, 155 Atl. 887 (1931); *Springfield Gas & Elec. Co. v. City of Springfield*, 292 Ill. 236, 126 N.E. 739 (1920).

¹⁵Reese, *State Regulation of Municipally Owned Electric Utilities*, 7 GEO. WASH. L. REV. 557 (1939).

¹⁶*Denton v. City of Sapulpa*, 78 Okla. 178, 189 Pac. 532 (1920).

¹⁷*Schmoltdt v. Oklahoma City*, 144 Okla. 208, 291 Pac. 119 (1930).

¹⁸*Chickasha Cotton Oil Co. v. Cotton County Gin Co.*, 40 F.2d 846 (C.C.A. 10th 1930).

¹⁹*State ex rel. Edwards v. Millar*, 21 Okla. 448, 96 Pac. 747 (1908).

²⁰*Oklahoma City v. State*, 28 Okla. 780, 115 Pac. 1108 (1911).

²¹*Barnes v. Hill*, 23 Okla. 207, 99 Pac. 927 (1909).

²²*Golfview Realty Co. v. Sioux City*, 222 Iowa 433, 269 N.W. 451 (1936); *Capen v. City of Portland*, 112 Ore. 14, 228 Pac. 105 (1924).

²³*City of Belton v. Ellis*, 254 S.W. 1023 (Ct. of Civil App., Texas, 1923).

²⁴11 TEX. L. REV. 530, 533.

²⁵*Schurtz v. Grand Rapids*, 208 Mich. 510, 175 N.W. 421 (1919).

to the phrase, confining it to the more traditional meaning. This would include water, gas and electric plants, street railway and bus facilities, sewage disposal units, and the like. A public auditorium is not a utility in Ohio,²⁶ but its purchase by a municipality was allowed. A stadium was held not to be a utility.²⁷ A theatre was also held not to be a utility.²⁸ However, an airport is a utility,²⁹ and a public garage is within the definition to the extent that it is used for governmental purposes.³⁰

The problem of what constitutes a public utility in Ohio for purposes of exercising the power granted under Article XVIII, Section 4, arises infrequently. But for purposes of determining tax exemption of municipally-owned utility property, recent decisions, as will be more fully indicated later in this discussion, have denied tax exemption where the utility was being operated in the municipality's proprietary capacity as distinguished from its governmental capacity.³¹ There would seem to be a danger that the tax exemption cases might be used as authority for narrowing the definition of public utility and thereby limiting the power of municipalities to acquire or construct public utilities under the authority of Article XVIII, Section 4.

Sections 4 and 5 of Article XVIII are exclusive in determining the procedure to be followed to acquire or construct a public utility, or to contract with a privately-owned utility for products or services.³² The power of a municipality to contract with a privately-owned public utility for its products or services cannot be modified by statute,³³ nor by a restriction in a home rule charter.³⁴

The procedure for acquisition or construction of a utility, as well as for contracting with a privately-owned utility for services, is initiated by ordinance.³⁵ In the case of contracts with privately-owned utilities for services, the written acceptance of the ordinance by the utility consummates a binding contract.³⁶ Whether the or-

²⁶*Heald v. City of Cleveland*, 19 Ohio N.P. (N.S.) 305, 27 Ohio Dec. 435 (1916).

²⁷*Meyer v. City of Cleveland*, 35 Ohio App. 20, 171 N.E. 606 (1930).

²⁸*State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913).

²⁹*Toledo v. Jenkins*, 143 Ohio St. 141, 54 N.E.2d 656 (1944); *State ex rel. Chandler v. Jackson*, 121 Ohio St. 186, 167 N.E. 396 (1929).

³⁰*City of Cleveland v. Ruple*, 130 Ohio St. 465, 200 N.E. 507 (1936).

³¹*Zangerle v. Cleveland*, 145 Ohio St. 347, 61 N.E.2d 720 (1945); *City of Shaker Heights v. Zangerle*, 148 Ohio St. 361, 74 N.E.2d 318 (1947).

³²*Kuertz v. Gas & Elec. Co.*, 27 Ohio N.P. (N.S.) 221 (1927).

³³*Lima v. Public Utilities Commission*, 100 Ohio St. 416, 126 N.E. 318 (1919); *Link v. Public Utilities Commission*, 102 Ohio St. 336, 131 N.E. 796 (1921).

³⁴*Gas & Fuel Co. v. Columbus*, 42 F.2d 379 (C.C.A. 6th 1930).

³⁵OHIO CONST. Art. XVIII, § 4.

³⁶*State ex rel. Sweeney v. Michell*, 46 Ohio App. 59, 187 N.E. 739 (1933); *Link v. Public Utilities Commission*, 102 Ohio St. 336, 131 N.E. 796 (1921).

dinance anticipates acquisition or construction of a utility, or merely contracting with a utility for services, it shall not be effective for 30 days subsequent to its passage.³⁷ If within that 30-day period a petition signed by ten percent of the electors who cast votes at the last preceding general election be submitted, a referendum shall be had,³⁸ in which event the ordinance shall not be effective until approved by a majority of the persons voting on the issue.³⁹ In the absence of a petition for referendum, the council is without power to submit the issue to the electorate.⁴⁰ The referendum provided for in Section 5 is permissive, and the state legislature may compel a referendum without petition where the legislature has relaxed limitations on the power of the municipality to increase its indebtedness.⁴¹ In such a case, the courts have imputed an unwillingness to the legislature to subject the municipality to increased indebtedness without approval of the electorate.

The right to referendum provided for in Section 5 is only applicable to the ordinance initiating the procedure for acquisition or construction of a public utility or for a contract with a utility for services, assuming that such ordinance provides for methods of financing the project.⁴² Subsequent ordinances implementing the execution of the initial ordinance are exempted from referendum under Section 5.⁴³ Thus, a filtration plant added to a waterworks was considered exempt from Section 5, but subject to the referendum provisions of Ohio General Code Section 4227-1 *et seq.*⁴⁴ Of course, any attempt by a municipality to reconstruct an existing utility under the guise of adding to it in order to evade the referendum provision of Article XVIII, Section 5, would be considered an abuse of power, and, therefore, subject to judicial intervention.⁴⁵

The 30-day period in Section 5 within which a petition may be filed is jurisdictional.⁴⁶ An attempt by a municipality to change the 30-day period by charter provision was held to be ineffective.⁴⁷

³⁷OHIO CONST. Art. XVIII, § 5.

³⁸*Ibid.* For sufficiency of petition, see *State ex rel. City of Middletown v. City Commission of Middletown*, 140 Ohio St. 368, 44 N.E.2d 459 (1942).

³⁹OHIO CONST. Art. XVIII, § 5.

⁴⁰*State ex rel. Wehr v. Bellevue*, 138 Ohio St. 93, 32 N.E.2d 839 (1941).

⁴¹*State ex rel. Campbell v. Cincinnati Street Railway Co.*, 97 Ohio St. 283, 119 N.E. 735 (1918).

⁴²*State ex rel. Didelius v. Sandusky*, 131 Ohio St. 356, 2 N.E.2d 862 (1936), *overruling State ex rel. Diehl v. Abele*, 119 Ohio St. 210, 162 N.E. 807 (1928).

⁴³*Ibid.*

⁴⁴*Shryock v. Zanesville*, 92 Ohio St. 375, 110 N.E. 937 (1915). *Accord: State ex rel. Nicholl v. Miller*, 127 Ohio St. 103, 187 N.E. 75 (1933). *But cf: Priest v. Wapakoneta*, 8 Ohio Op. 439, 32 N.E.2d 869 (1937).

⁴⁵*Shryock v. Zanesville*, *supra*, note 44.

⁴⁶*State ex rel. Sweeney v. Michell*, 46 Ohio App. 59, 187 N.E. 739 (1933).

⁴⁷*Ibid.*

In some states, the acquisition of public utilities is not subject to referendum.⁴⁸

The proviso in Ohio General Code Section 3990, requiring a village, which proposed to enter the electric or gas utility business, to purchase the facilities of a privately-owned gas or electric utility conducting such a business therein, where such utility still held an unexpired franchise, was held unconstitutional, in *Dravo-Doyle v. Village of Orrville*⁴⁹ as an unwarranted limitation on the power of municipalities to acquire or construct utilities as granted in Article XVIII, Section 4.

Municipally-owned or operated public utilities are not within the jurisdiction of the Public Utilities Commission of Ohio, and are specifically excepted by Ohio General Code Section 614-2a from regulation by the Commission except as to the requirement of submission of accounts and records and as to valuation of property at the request of the municipal council.⁵⁰

Under the grant of Article XVIII, Section 4, the power to contract for services or products of a privately-owned public utility would seem necessarily to include the power to contract as to rates.⁵¹ Rate-fixing, however, is subject to the restrictions imposed by the legislature coincident to the legislative grants of power to the municipality to fix rates. Ohio General Code Section 3982 allows arbitrary exercise of rate-fixing power by municipal ordinance. Ohio General Code Section 3983 prescribes that where the company concerned has filed an acceptance completing a contract for service, for a period not exceeding ten years, such contract is binding on both parties for that period.⁵² Both of these sections antedate the adoption of the amendment, which contains no corresponding time-limitation on the municipality's power to contract with a utility. It would seem that the unlimited grant to the municipality would dispose of this pre-existing statutory limitation, but municipal attempts to contract for longer than the statutory period are invalid. The Public Utilities Commission is, broadly, available to the company concerned only where the municipality has failed to act effectively,⁵³ in which event the commission is empowered to

⁴⁸Ore. Laws 1933, c. 354 § 1. See also: Fla. Laws, 1935, Sen. Bill No. 515, § 1 (g).

⁴⁹93 Ohio St. 236, 112 N.E. 508 (1915).

⁵⁰33 OHIO JUR., Title, Public Utilities, § 43.

⁵¹Ohio River Power Co. v. Steubenville, 99 Ohio St. 421, 124 N.E. 246 (1919).

⁵²Link v. Public Utilities Commission, 102 Ohio St. 336, 131 N.E. 796 (1921).

⁵³OHIO GEN. CODE § 614-44. United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N.E. 884 (1923); East Ohio Gas Co. v. Public Utilities Commission, 137 Ohio St. 225, 28 N.E.2d 599 (1940).

fix rates,⁵⁴ or where the municipal ordinance fixes unreasonable rates which have not been accepted by the company.⁵⁵ The power of the commission to revise in certain circumstances the rates prescribed by the municipality is an exercise of the police power of the state,⁵⁶ and is paramount to the self-governmental powers allotted to the municipality in Article XVIII.⁵⁷ This provides in effect that an administrative agency of the state has the power to revise legislation of the municipal governing body. Provision is specifically made by Ohio General Code Section 614-44 for the utility to appeal from the legislation of a municipality in regard to rate-fixing where such is deemed unreasonable. This provision has been held not to be in violation of Article XVIII.⁵⁸ Appeal may be made to the Public Utilities Commission which is authorized to take jurisdiction and fix reasonable rates in revision of the municipal ordinance.⁵⁹ Or suit may be brought in a court of competent jurisdiction to enjoin enforcement of the unreasonable rates.⁶⁰

Further, it is within the power of the Public Utilities Commission to revise an ordinance which requires extension of the distribution system,⁶¹ improvement of street railway rails or facilities,⁶² improvement of waterworks,⁶³ or which grants an indeterminate permit,⁶⁴ that is, a permit which allows operation for an indeterminate period, until such time as the municipality shall exercise its right to purchase the property of the utility, and in such case, even where there is a stipulated price.⁶⁵

It is difficult to contend effectively that the power of the municipality to regulate public utilities has been much enlarged under the provisions of Article XVIII. The pre-Home Rule limitations

⁵⁴OHIO GEN. CODE § 614-44. See *Local Telephone Co. v. Cranberry Mutual Telephone Co.*, 102 Ohio St. 524, 133 N.E. 527 (1921)?

⁵⁵OHIO GEN. CODE § 614-44.

⁵⁶*Cleveland Telephone Co. v. Cleveland*, 98 Ohio St. 358, 121 N.E. 701 (1918).

⁵⁷*Ibid.* OHIO CONST. Art. XVIII, § 3.

⁵⁸*Cincinnati v. Public Utilities Commission*, 98 Ohio St. 320, 121 N.E. 688 (1918).

⁵⁹OHIO GEN. CODE § 614-44.

⁶⁰*United Fuel Gas Co. v. Ironton*, 107 Ohio St. 173, 140 N.E. 884 (1923); *New Lexington v. Ohio Fuel Supply Co.*, 24 Ohio C.C. (N.S.) 537, 27 Ohio C.D. 678 (1913).

⁶¹OHIO GEN. CODE § 614-51.

⁶²OHIO GEN. CODE § 3812-2.

⁶³OHIO GEN. CODE § 1255 *et seq.*

⁶⁴OHIO GEN. CODE § 4000-1 through § 4000-15.

⁶⁵*Ibid.*

imposed by the legislature have been continued in effect.⁶⁶ The effect of the Home Rule Amendment in this field has been to secure these powers to the municipalities free of the danger of complete destruction by legislative enactment, but there has been no enlargement over powers as they existed prior to the adoption of the amendment insofar as regulation is concerned, with the exception of such local police powers, granted under Article XVIII, Section 3, as may be classified as regulatory powers.

The great majority of the cases involving appeal from municipal ordinances as being unreasonable have resulted in revision and modification of the ordinances in question by the Public Utilities Commission.⁶⁷ It has been argued that this indicates a protection by the commission of the privately-owned public utilities from local prejudices and antagonisms. This conclusion paints a disturbing picture of the relationship between the municipalities and the utilities, and raises doubt as to the wisdom of extended municipal contracting and regulating authority. On the other hand, the result quite conceivably may depend upon an honest trait of utility-mindedness on the part of the commission. Certainly such an explanation is not an impossibility under the circumstances.

It seems clear that municipally-owned property, although classed as a public utility, is subject to real and personal property

⁶⁶OHIO GEN. CODE §§ 614-44 *et seq.* 3959, 3982, 3983, 4000-1 *et seq.* *United Fuel Gas Co. v. Iron-ton*, 107 Ohio St. 173, 140 N.E. 884 (1923); *Cincinnati v. Public Utilities Commission*, 91 Ohio St. 331, 110 N.E. 461 (1915). *Cincinnati v. Roettinger*, 105 Ohio St. 145, 137 N.E. 6 (1922), held that statutory limitation over the disposition of surplus revenue was not such control on the conduct or operation of the municipal waterworks as to be invalidated by Art. XVIII of the constitution. On the theory that income from municipal utilities over and above the cost of supplying the service or products is classifiable as tax revenue, the court further held that in §§ 4, 5 and 6 of Art. XVIII there was no implication that municipalities have full authority over rates and charges as such implied authority would render meaningless all limitations on taxation. It is argued that the retention of legislative control over the disposition of surplus depends then on § 13 of Art. XVIII. The retention of other regulatory powers is sought to be justified as an exercise of the state police power, and included among the "general powers" with which, by the provisions of § 3, Art. XVIII, municipal ordinances are not to be in conflict. This retention acts as an indirect, but very real limitation upon the rate-fixing and regulatory powers of the municipality. How broad, then, is the grant of §§ 4, 5 and 6 of Art. XVIII? It would seem that to follow the theory of the court to its logical conclusion would lead inevitably to the result that the legislature might thoroughly emasculate the power of the municipality to acquire and construct utilities by forcing it to submit to confiscatory rates, and the power to contract with a private utility, by hamstringing the municipality's powers of regulation over the utility with which it contracts. For a discussion of the legislature's regulatory powers over the disposition of surplus, see *infra*, page 149.

⁶⁷33 OHIO JUR., Title, Public Utilities, § 187.

taxes in Ohio, unless specifically exempted, as are waterworks,⁶⁸ or unless used exclusively for public purposes.⁶⁹ Ohio General Code Section 5351 states that "public property used for a public purpose" shall be exempt, but includes no requirement as to the exclusiveness of the purpose. But the Supreme Court of Ohio has twice held that the requirement of exclusiveness is implicit;⁷⁰ that in the operation of a transportation system which has shown a clear profit, the municipality is operating in a proprietary, as distinguished from a governmental capacity, and that both real and personal property incident to the operation are taxable. The court draws heavily on the constitutional provision authorizing the legislature to exempt real property that is used exclusively for public purposes,⁷¹ and carries that restriction over to apply to personalty by a rather strict construction of Section 5351. Further, there is some argument that the intent of the legislature is clarified by a consideration of Section 5357, which exempts waterworks property from taxation. Some criticism has been advanced that the distinction between proprietary and governmental functions has been made dependent upon the fact of profit-making. This, critics claim, puts a premium on inefficiency, and renders the municipally-owned utility which operates at a loss exempt from taxation. The court has not been squarely faced with the question. The decided cases have determined merely that Section 5351 must be interpreted to read "public property used *exclusively* for a public purpose" is exempt from taxation, and that the real and personal property of municipally-owned, profit-making rapid transit lines do not fall within such exemption. In the *Cleveland Railway* case,⁷² it was forcefully contended by the counsel for the utility that the primary purpose of the railway was to furnish efficient transportation for the inhabitants of Cleveland, that such purpose was controlling, that the municipally-owned utility was entitled to incidental profit, without such profit making the public property liable to taxes. The court denied the contention, and was apparently satisfied to rest its decision on the proprietary capacity theory. It is interesting to note that the Supreme Court of Arkansas, faced with an interpretation of a constitutional provision which read in part "public property used exclusively for public purposes" stated: "[the phrase] must be given a practical construction and so used means

⁶⁸OHIO GEN. CODE § 5357.

⁶⁹Zangerle v. Cleveland, 145 Ohio St. 347, 61 N.E.2d 720 (1945).

⁷⁰*Ibid.* City of Shaker Heights v. Zangerle, 148 Ohio St. 361, 74 N.E.2d 318 (1947).

⁷¹OHIO CONST. Art. XII, § 2.

⁷²Zangerle v. Cleveland, 145 Ohio St. 347, 61 N.E.2d 720 (1945).

'substantially all' or 'for the greater part.'"⁷³ The cases may be distinguished on the facts, since the Arkansas case was not concerned primarily with a tax exemption problem, but rather with a dispute concerning sale of surplus products by the utility. In any event, the law in Ohio seems well settled as to tax exemption of municipally-owned public utilities acquired by virtue of the provisions of Article XVIII. Unless the real and personal property can be shown to be used exclusively for a public purpose, or unless it be specifically exempted by the legislature, there is no exemption from property taxes.

The municipally-owned public utility is ordinarily financed by bond issue. Article XVIII, Section 12 provides that financing bonds which exceed the municipal debt limit may be secured by the revenue and property of the utility, but not by the general credit of the municipality.⁷⁴ Mortgage revenue bonds are the common media for financing municipal utilities.

The rates and charges exacted by a municipal utility for its service or product are not taxes.⁷⁵ They are the price exacted for the product or service.⁷⁶ The normal necessary drains upon the revenues derived from the rates and charges of the municipally-owned utility include the current operating costs, payment of interest on the mortgage revenue bonds, and reduction of the bonded indebtedness. If, after the normal charges against the revenue have been made, there remains a surplus, certain provisions of the Ohio General Code have prescribed a disposition of such surplus.⁷⁷ Prior to the adoption of the amendment, the pertinent statutes limited the disposition to improvement of and addition to the utility in question. Subsequent to the adoption of the amendment, and in the absence of express statutory limitation, it was initially held that such surplus, derived from revenue as distinguished from taxes, was not within the purview of Ohio General Code Section 5625-13a, which permitted transfer by the municipality of funds under its control to other funds, on the theory that such statute, being within the tax sections, pertained only to tax revenue.⁷⁸

That decision soon was modified insofar as the court had distinguished between tax revenues and those derived from other sources, and the court upheld the transfer of the surplus from an electric plant to a general fund under the authority contained in

⁷³*Yoes v. City of Fort Smith*, 207 Ark. 694, 182 S.W.2d 683 (1944), interpreting ARK. CONST., Art. XVI, § 5. *Accord*, *County of Anoka v. City of St. Paul*, 194 Minn. 554, 261 N.W. 588 (1935).

⁷⁴OHIO CONST. Art. VIII, § 12.

⁷⁵*Lakewood v. Rees*, 132 Ohio St. 399, 8 N.E.2d 250 (1937).

⁷⁶*Ibid.* *City of Shaker Heights v. Zangerle*, 148 Ohio St. 361, 74 N.E.2d 318 (1947).

⁷⁷OHIO GEN. CODE §§ 400-26, 3959.

⁷⁸*Lakewood v. Rees*, 132 Ohio St. 399, 8 N.E.2d 250 (1937).

Section 5625-13a.⁷⁹ The cases may be distinguished on the facts, since the previous decision concerned surplus from a waterworks, the surplus of which is controlled by the provisions of Ohio General Code Sections 3959 and 3960. The later decision seems to be authority for the proposition that a municipality may support its less profitable activities with the surplus revenues of other more profitable utilities, except waterworks.⁸⁰

When a municipally-owned utility produces an amount of product greater than that needed within the municipality, the question of disposition of surplus arises. Sale of surplus products of such utilities is allowed in all states except Missouri.⁸¹ There, the constitutional and legislative provisions concerning utilities fail to provide for extra-territorial sales, and the courts have refused to find an implied power in the municipalities to sell to outlying areas.⁸²

The majority rule seems to be in accord with the Missouri holding, but later cases indicate that the minority rule is gaining

⁷⁹*City of Niles v. Union Ice Corp.*, 133 Ohio St. 169, 12 N.E.2d 483 (1938).

⁸⁰The courts' recognition of the retention by the legislature of certain regulatory powers has already been discussed at length hereinbefore (see note 66 *supra*). In *Ellis v. Urner*, 29 Ohio Op. 553, 15 Ohio Supp. 72 (1944), the court specifically stated that § 3959, Ohio General Code, was an exception to the general fund transfer statutes. The court has been zealous in preserving this exception, even when the waterworks surplus was sought to be applied to related and dependent expenditures such as sewage disposal facilities, as in *Hartwig Realty Co. v. Cleveland*, 128 Ohio St. 583, 192 N.E. 880 (1934), and fire hydrants, as in *Alcorn v. Deckebach*, 31 Ohio App. 142, 166 N.E. 597 (1928). *Contra*, *Johnson v. Dermott*, 189 Ark. 830, 75 S.W.2d 243 (1934); *City of Harrison v. Braswell*, 209 Ark. 1094, 194 S.W.2d 12 (1946); *Guthrie v. City of Mesa*, 47 Ariz. 336, 56 P. 2d 655 (1936). Other than surplus waterworks revenue, there would seem to be no difficulty in Ohio barring the free transfer of any municipal utility surplus to any municipal fund. OHIO GEN. CODE § 5625-13a.

The source of the legislature's power to prescribe the disposition of surplus revenues is difficult to define. In *Cincinnati v. Roettinger*, 105 Ohio St. 145, 137 N.E. 6 (1922), the court adopts a theory that revolves around the possibility that, by charging excess rates, and transferring an abnormal surplus to the general municipal funds, such surplus becomes, in effect, a left-handed tax, whereby the normally tax-borne governmental expenses are a burden instead on the utility-buyers. It is conceded that such an evasion of the legislature's admitted control of municipal taxing power should be subject to limitation in some form, but the view presently expounded by the Ohio courts denies, in effect, the right of the municipality to a fair return, if it should be the desire of the legislature thus to limit the rates and charges.

⁸¹*Taylor v. Dimmitt*, 336 Mo. 330, 78 S.W.2d 841 (1935).

Reese, *State Regulation of Municipality Owned Electric Utilities*, 7 GEO. WASH. L. REV. 557 (1939).

⁸²*Taylor v. Dimmitt*, *supra*, note 81.

strength. That is to say, there is a tendency to imply a power in the municipality to sell the surplus products of its utilities to outlying territories.⁸³ But there is still a reluctance to allow the municipalities, in the absence of express statutory authority, to extend the facilities of its utilities beyond its corporate limits.

By constitutional provision in Ohio, municipalities may sell the surplus products of their utilities, including transportation service, to outsiders. However, such sale may not exceed 50% of the "total service or product supplied by such utility within the municipality."⁸⁴

Determination of the amount saleable as surplus has been litigated in Ohio in a transportation case.⁸⁵ Where a village which had 5 buses, making 25 daily round trips for its inhabitants, added 2 buses and 10 round trips, it was held not to have violated the 50 percent rule. The court discarded the mileage test and the number of passengers test in determining the amount of service used by the inhabitants of the village, and said that the amount of equipment and facilities plus the human agencies reasonably required to operate them, constitute public utility service.

It is submitted that the test is too broad in cases involving transportation, and that its use in a case involving electricity, gas, or water, might serve only to cloud the issue. Under the literal interpretation of the syllabus of the case, a municipality could enlarge its transportation facilities to include an area of very great size. It is conceded that in cases concerned with sale of surplus electricity, water or gas, the product is more easily measured, and that, therefore, the problem is less likely to arise.

In any event, the law is clearly settled in Ohio that the municipal utility may not only sell its product beyond the corporate limits of the municipality, but that it also may extend its facilities beyond the corporate limits, subject only to the limitation of Article XVIII, Section 6 of the Constitution of Ohio.⁸⁶

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⁸³98 A.L.R. 1001.

⁸⁴OHIO CONST. Art. XVIII, § 6.

⁸⁵Southwestern Bus Co. v. Village of North Olmstead, 41 Ohio App. 525, 181 N.E. 491 (1932).

⁸⁶Miller v. Orrville, 48 Ohio App. 87, 192 N.E. 474 (1934).